UNITED NATIONS

General Assembly

FORTY-NINTH SESSION

Official Records

SIXTH COMMITTEE
33rd meeting
held on
Monday, 14 November 1994
at 3 p.m.
New York

SUMMARY RECORD OF THE 33rd MEETING

Chairman: Mr. MADEJ (Poland)
(Vice-Chairman)

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Distr. GENERAL
A/C.6/49/SR.33
29 November 1994

ORIGINAL: ENGLISH

94-82280 (E)

In the absence of Mr. Lamptey (Ghana), Mr. Madej (Poland), Vice-Chairman, took the Chair.

The meeting was called to order at 3.35 p.m.

AGENDA ITEM 143: CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY (continued) (A/C.6/49/L.2)

1. Mr. LEGAL (France) said that, far from being an avowal of failure as some delegations had implied, the report by the Chairman of the informal consultations (A/C.6/49/L.2) had set forth clearly the disagreements on the matter of the jurisdictional immunities of States and had offered suggestions for resolving them.

2. The customary rules governing the jurisdictional immunities of States were no longer as relevant as they had been in the past. States were increasingly involved in economic and commercial operations which were largely unrelated to their sovereign functions. Application of the customary rules was resulting in distortions and even inequities. Consequently, some States had enacted domestic legislation to strike a balance between the interests at stake. The existence of a number of different legal regimes on jurisdictional immunities was giving rise to uncertainty. There was thus a clear need for an international system of codification to establish the principle of the jurisdictional immunities of States and also, with an eye to balance and equity, to define the limits of that immunity. Such a definition must take into account the separate legal personality of States.

3. In drafting the articles on the jurisdictional immunities of States, the International Law Commission had endeavoured to achieve a balance between the principles of international law and recent legal developments in the field. Several issues were still unresolved. First, the scope of application of the draft articles had to be clearly defined. The articles should not dilute the concept of the State by applying it to an infinite number of subdivisions which did not perform acts in the exercise of their sovereignty. A State would be defined by being party to the convention. However, that did not exclude the introduction of an element of flexibility: as proposed by the Chairman of the informal consultations in document A/C.6/49/L.2, the immunity of a constituent unit could be recognized on the basis of a declaration made by a federal State.

4. A second area of disaccord had emerged with regard to the criteria for determining whether a contract or transaction was commercial or not, as dealt with in draft article 2, paragraph 2. In his delegation's view, the nature of the contract should be the primary criterion; however, the purpose of the contract was inseparable from and contributed to defining its nature. His delegation agreed that a State which considered the criterion of purpose to be irrelevant should not be required to apply that criterion. The circumstances under which jurisdictional immunity could be invoked by the contracting State should be clear to all the parties concerned. In that connection, it had been

suggested that a State might either make a general declaration in relation to the convention or notify the other party in relation to a particular transaction. In any event, States should not be discriminated against on the basis of how they defined the scope of the applicable law.

5. The Chairman's suggestions with regard to article 11 were sensible and logical. Paragraph 2 (a) of article 11 stipulated that, in the case of contracts of employment, immunity from jurisdiction could be invoked if the employee had been recruited to perform functions closely related to the exercise of governmental authority. The provision should make it clear that those who performed functions which were closely related to the functions of the State were under special constraints and had a special relationship with the authorities and a certain discretionary power. Paragraph 2 (c) granted the State the right to invoke immunity from jurisdiction if the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded. That paragraph was incompatible with justice and protection of the individual and should be deleted. The rules of law must not vary according to the nationality of the person to whom they were being applied. There was a growing trend for workers to circulate freely from one State to another. In that context, paragraph 2 (c) represented a step backwards in terms of social law, which should apply to all persons equally regardless of their nationality.

6. The question of State immunity from measures of constraint was highly sensitive. The draft articles as a whole dealt with jurisdictional immunities, while articles 18 and 19 actually concerned measures of execution. His delegation had already pointed out the difficulties inherent in combining in one convention two matters which were related but fundamentally different. Given the differences among legal systems world wide, it was premature to envisage a system under which there would be an automatic obligation to enforce judgements rendered in a foreign State against all States. The Commission's definition of property which was likely to be affected by measures of execution appeared reasonable. To go any further might upset the balance of international relations and could in certain cases give legitimacy to arbitrary decisions.

7. A few other difficulties remained. It was generally agreed that provisions regarding aircraft and spacecraft should be incorporated into draft article 16 (Ships owned or operated by a State). The provisions dealing with modalities for the implementation of the convention could be improved. In general, however, the debate had centred on substantive issues which, in the view of some, might block the success of a diplomatic conference for the purpose of adopting a convention. His delegation was less pessimistic. Some States had already enacted domestic legislation to govern the relations between the State and commercial enterprises and thus were less interested in adopting an international convention. There was still a need, however, to codify the law in that area. States which had sufficient legislation could always choose not to ratify the convention or could make reservations to it. They should not prevent other States from adopting a much needed international convention which would serve as a general guide.

8. The representative of Brazil was fully justified in his plan to submit a draft resolution on the jurisdictional immunities of States and their property. The request of some States for a two-year period of reflection before attempting to organize an international conference seemed reasonable.

9. Mr. CHINOY (India) said that the Chairman of the informal consultations had suggested in his report (A/C.6/49/L.2), with regard to paragraph 1 (b) of draft article 2, under which the term "State" was defined, that the immunity of a constituent unit of a State could be recognized on the basis of a declaration made by a federal State. In the Chairman's view, that approach would allow greater flexibility in the light of the differences in the national laws of federal States. His delegation did not agree; in its view, the constituent unit of a federal State should be at all times considered as part of the State. There was therefore no need for a State to make a declaration to that effect.

10. Draft article 2, paragraph 1 (c), dealt with the definition of the term "commercial transaction". In that connection, the Chairman of the informal consultations had noted that a greater measure of certainty could be achieved by giving States the option of indicating the potential relevance of the purpose criterion under their national law and practice either by means of a general declaration in relation to the convention or a specific notification to the other party in relation to a particular transaction. His delegation was not in favour of modifying article 2, paragraph 1 (c). It would be very difficult for a State to make such a general declaration because each case had to be decided individually by the court. Requiring that a declaration be made in every case would be cumbersome and might also cause the other party to repudiate the contract.

11. Draft article 10, paragraph 3, dealt with the State enterprise or other State entity in relation to commercial transactions. The Chairman of the informal consultations had suggested that the scope of article 10, paragraph 3, should be modified by stating three specific conditions under which the question of the liability of a State could arise in relation to a commercial transaction engaged in by a State enterprise, namely, where: (a) the State enterprise engaged in the transaction as an authorized agent of the State; (b) the State acted as a guarantor of a liability of the entity; or (c) the State entity had misrepresented its financial position or had subsequently reduced its assets to avoid satisfying a claim. While it could accept condition (b), his delegation could not endorse the other two conditions. Paragraph 3 of article 10 was satisfactory as it stood and should not be amended.

12. With regard to draft article 11 (Contracts of employment), the Chairman of the informal consultations had suggested the possibility of clarifying the wording in paragraph 2 (a) and of deleting paragraph 2 (c). His delegation was not in favour of those proposals. Paragraph 2 (a) was sufficiently clear as it stood. Paragraph 2 (c) was important because it established a necessary link between the employee and the court of the foreign State involved.

13. With reference to draft article 18 (State immunity from measures of constraint), the Chairman of the informal consultations had noted that in view of the complexity of the issue, it had not been possible to arrive at a compromise solution. In his delegation's view, article 18 was well balanced and should not be modified.

14. The draft articles in general were balanced and took into account the interests of both developing and developed countries. In his view, the articles were not in need of modification. The best course would be to work towards the early convening of a conference of plenipotentiaries which would finalize a convention on the jurisdictional immunities of States.

15. Mr. SIDI-ABED (Algeria) said that the Commission had elaborated a set of draft articles which, once adopted in the form of a convention, would fill an important legal gap by dealing with a basic aspect of economic and commercial relations between States. The convention must take into account State practice as well as the legitimate interests of States based on the wide variety of juridical systems and economic circumstances in the world. In so doing, it would serve a dual purpose: it would codify the law in a particularly sensitive area and would help to reduce any international tensions which might arise owing to the absence of clear and precise regulations in that field.

16. The draft articles represented a balanced, realistic synthesis of the major substantive issues. The solutions that had emerged by consensus during the informal consultations would no doubt contribute to that equilibrium and should be widely acceptable.

17. With regard to the criteria for determining the commercial character of a contract or transaction, it was his view that attempting to derive an international norm from the practice of certain States while overlooking the practice of others could only complicate the task of codification. He therefore endorsed the compromise proposed by the Chairman of the informal consultations, under which account was taken both of those States which considered the nature of the contract to be the primary criterion for determining the nature of a transaction and of those which considered the purpose of the contract to be the primary criterion. While the suggested compromise continued to grant priority to the criterion of the nature of the contract, it left the contracting parties free to clarify the situation through a bilateral agreement or through a general declaration or a specific notification. Such an approach might serve as a starting point for further work. In contrast, letting a foreign court decide the fate of a State in its commercial relations was not an equitable solution, given the exclusive competences conferred on the State under international law.

18. The question of State immunity from measures of constraint, as dealt with in draft articles 18 and 19, was also of particular importance to his delegation. The absence of jurisdictional immunity for a State did not in any way attenuate or eliminate its immunity from measures of execution. The possibility of applying pre-judgement measures of constraint was inadmissible. The draft articles should include a reference to the link between property which was subject to measures of constraint, the claim and the contracting body or

entity involved. The articles did not, and rightly so, deal with measures of constraint ordered against the property of a State which was located in a third State. Such a matter would only hinder negotiations on an already complex matter.

19. His delegation could not endorse the proposal, made during the informal consultations, to make the application of measures of constraint a binding treaty obligation incumbent on States against which a foreign court had rendered a decision. The absence of similar rules under international law could not affect in any way a State's obligation to respect its international commitments and to honour its obligations in good faith. At the same time, it was reasonable to grant the State in question a period of time to carry out the measures of constraint which it had expressly accepted.

20. His delegation supported the reasonable approach suggested by the Chairman of the informal consultations and was in favour of convening a conference of plenipotentiaries for the adoption of an international convention in the area of jurisdictional immunities of States.

21. Mr. NATHAN (Israel) said that the Sixth Committee was faced with the problem of whether sufficient common ground existed on the major substantive issues for the conclusion of a convention on jurisdictional immunities of States and their property.

22. Two main issues remained to be resolved. The first was the question of the criteria by which the commercial character of a transaction should be determined. In his view, those criteria should be objective and definite. A private party entering into a contract with a State should be in a position to ascertain whether or not State immunity would be attached to that particular transaction. Those objectives could be achieved by establishing criteria which were generally applicable to the transaction, either by a general declaration or in reference to a specific transaction, rather than leaving the determination of the criteria to the discretion of the State.

23. The second major issue was that of the application of measures of constraint against State property. In his view, such measures should not be applied to the specific categories of property listed under draft article 19, which might also include State property not used or intended to be used for commercial purposes. At the same time, to restrain a successful litigant from taking measures of constraint against State property might unjustly deprive the litigant of the fruits of protracted and expensive litigation and leave him with an unenforceable judgement.

24. The reasoning with respect to enforcement measures applied equally to prejudgement measures of constraint, which in many cases might be required to secure property for the eventual satisfaction of a judgement given in favour of a plaintiff.

25. As he understood it, there was general agreement that the time had come to clarify and formulate those issues on which there were no clear-cut rules of international law and that it would be useful to conclude a convention on jurisdictional immunities of States. However, given the differences of opinion which continued to exist, it would not be advisable to convene a conference immediately. Nor would any useful purpose be served by resubmitting the draft articles to the International Law Commission. The proposals contained in the report of the Chairman of the informal consultations (A/C.6/49/L.2) could, however, serve as a basis for written comments by Governments and might lead to further consultations and, eventually, to the convening of a conference for the adoption of a convention.

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26. The CHAIRMAN said that Chile had become a sponsor of draft resolution A/C.6/49/L.6.

The meeting rose at 4.15 p.m.